DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

AEG
Docket No. 815-99
22 June 1999

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF [redacted]

Ref: (a) 10 U.S.C. 1552

Encl: (1) Case Summary
(2) Subject's naval record

1. Pursuant to the provisions of reference (a), Petitioner, a former enlisted member of the Navy, applied to this Board requesting, in effect, that his naval record be corrected to show that he was transferred to the Fleet Reserve and not discharged. Alternatively, he requests reinstatement in the Navy.

2. The Board, consisting of Messrs. Pfeiffer, Brezna and Tew, reviewed Petitioner's allegations of error and injustice on 15 June 1999 and, pursuant to its regulations, a majority determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner's application to the Board was filed in a timely manner.

c. Petitioner first enlisted in the Navy on 30 October 1978. During the next 12 years, he served in a generally excellent to outstanding manner, qualifying in submarines and earning three awards of the Navy Achievement Medal. His enlisted performance evaluations between 1985 and 1991 reflect no mark below 4.0 in any marking category. In January 1990 he was advanced to the rate of machinists mate chief petty officer (MMC; E-7).

d. In August 1992 Petitioner received his only nonjudicial punishment for dereliction of duty, which resulted in a punitive letter of reprimand. It also appears that he was disqualified for duty in submarines and his selection for warrant officer was revoked. Additionally, he received an adverse evaluation and was

placed on Petty Officer Quality Control, thus restricting his reenlistment eligibility. However, he was removed from this program in March 1994 after his performance returned to the prior outstanding level. Petitioner then reenlisted for four years in March 1995. At that time, he was assigned to USS DIXON (AS-37).

e. On 12 July 1995 Petitioner began inpatient treatment at the Navy Alcohol Rehabilitation Center (NARC) after being diagnosed with alcohol dependence. He successfully completed this treatment on 9 August 1995. At that time, Petitioner's case manager made the following comments on Petitioner's treatment:

> During treatment, patient disclosed in-service drug use. This usage has been diagnosed by the NARC Medical Officer as drug dependency in full sustained remission, with no indication of use within the past year.

With regard to Petitioner's alcohol problem, the case manager stated that the final diagnosis was "alcohol dependence, in remission," and the prognosis for remaining chemically free was "fair." A psychological evaluation conducted during Petitioner's treatment diagnosed a mild personality disorder and noted prior use of marijuana and cocaine.

f. Subsequently, another patient in the Level III program executed a statement that reads, in part, as follows:

> It was said to me on several occasions by (Petitioner) that he had done drugs many times while in the Navy. These conversations took place while we were both in rehab . . . There were also several meetings that we attended where he admitted to being an alcoholic and drug addict. (Petitioner) stated to me that he had done various drugs, i.e. pot, speed and downers . . .

g. Petitioner was then reassigned to the Transient Personnel Unit (TPU), San Diego, CA. On 6 November 1995 administrative separation action was initiated by reason of misconduct due to drug abuse based on Petitioner's admissions during Level III treatment. At that time, he was notified that if separation was directed, the worst characterization of service he would receive would be a general discharge. Petitioner then elected to present his case to an ADB, which met on 4 and 20 December 1995.

h. At the ADB, the recorder introduced the foregoing evidence of the negative aspects of Petitioner's military record, along with a statement from the administrative officer aboard DIXON who recommended discharge despite his outstanding performance due to "his willful and gross misconduct by defying the Navy's zero tolerance drug abuse policy."

i. Petitioner's defense counsel introduced voluminous documentation attesting to his client's prior excellent performance and potential for further service. Counsel also

introduced a copy of 32 Code of Federal Regulations (CFR) 62.4, that reads, in part, as follows:

> a. . . . (I)t is the policy of (DOD) to:
>
> 5. Treat or counsel alcohol and drug abusers and rehabilitate the maximum feasible number of them.
>
> 6. Discipline and/or discharge drug traffickers and those alcohol and drug abusers who cannot or will not be rehabilitated, in accordance with appropriate laws, regulations, and instructions.

32 CFR 62.4 codifies Department of Defense Directive (DODDIR) 1010.4.

j. Counsel also presented testimony from two senior chief petty officers who worked with Petitioner aboard DIXON, both of whom recommended his retention. One chief noted that "this is a case where it was a problem he had 18 months ago and he'd already started the recovery process." Testimony was also received from a civilian co-participant in Alcoholics Anonymous. Finally, Petitioner testified under oath and discussed his career, described how he became involved in alcohol and drugs, and requested retention in the Navy. In his testimony, Petitioner said that he had not used drugs since February 1994.

k. After the recorder and Petitioner's counsel made final arguments, the ADB closed for deliberations. After about 45 minutes, the ADB reopened and the senior member announced unanimous findings and recommendations that Petitioner had committed misconduct due to drug abuse as alleged, but should be retained in the Navy.

l. On 17 January 1996 the commanding officer (CO) of the TPU forwarded Petitioner's case to the Chief of Naval Personnel (CNP). In his letter of that date the CO concurred with the findings of the ADB but opined as follows that the ADB's recommendation for retention should be disapproved:

> . . . Although (Petitioner's) disclosure of drug abuse was courageous and necessary for the purposes of achieving full recovery from substance abuse, it remains nonetheless a flagrant violation of well-publicized Navy policy. The situation is aggravated by the duration of the drug abuse and the fact that as a chief petty officer, he is in positions of special trust and authority, and has endangered his shipmates and compromised the national security. I believe that even if (Petitioner) continues with an aggressive after-care program, his future (CO's) would need to continually monitor his compliance. I also believe as a result of his conduct that he could no longer be entrusted with the responsibilities of a chief petty officer, or act as an effective role model for his

subordinates.

Accordingly, the CO recommended separation "with a discharge characterized as type warranted by service record (TWSR)."

m. On 18 January 1996, one day after the CO forwarded Petitioner's case to CNP, DODDIR 1010.4 was changed. These changes eliminated the requirements previously set forth in the directive to treat and counsel drug abusers and rehabilitate the maximum feasible number of them.

n. Subsequently, by an undated memorandum, CNP forwarded the case to the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN [M&RA]) recommending that Petitioner be discharged TWSR. In his letter, CNP justified that recommendation by paraphrasing the foregoing comments of the CO. On 14 March 1996 ASN (M&RA) approved the recommendation for discharge and, on 27 March 1996, Petitioner was honorably discharged after about 17 years and 5 months of active service.

o. In his application to the Board Petitioner argues, through counsel, that his discharge was improper since such action violated DODDIR 1010.4, and ASN (M&RA) abused his discretion in directing discharge. Counsel further contends that Petitioner's discharge violates the policy of allowing a servicemember to seek help during rehabilitation without fear of adverse consequences from any disclosures. Counsel also argues that due process of law is violated when such disclosures are used against the individual without first warning him of the possibility of such use.

p. Paragraph 1a of enclosure (5) to Chief of Naval Operations Instruction (OPNAVINST) 5350.4B states that an individual may initiate a "self-referral" for drug abuse counseling, treatment and rehabilitation. However, "self-referral does not preclude administrative discharge processing . . ." This policy is somewhat ameliorated by paragraph 4 of that enclosure, which states that information derived from a self-referral "may NOT be used for disciplinary purposes nor on the issue of characterization of service in separation proceedings." In this regard, the applicable sections of the *Naval Military Personnel Manual* (MILPERSMAN) state that the service of an individual discharged due to drug abuse is normally characterized as under other than honorable conditions, but characterization is limited to TWSR when separation is based on drug use disclosed through self-referral.

q. Article 31(b) of the Uniform Code of Military Justice (UCMJ) states as follows:

> No person subject to (the UCMJ) may interrogate or request any statement from . . . a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any

> statement regarding the offense of which he is accused or suspected, and that any statement made by him may be used as evidence against him in a trial by court-martial.

An individual is interrogated, within the meaning of Article 31(b), when there is "any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning." Mil.R.Evid. 305(b)(2), *Manual for Courts-Martial* (1995 ed.). The case law indicates that the exclusionary rule applies only to criminal proceedings and not to civil or military administrative actions. *United States v. Janis*, 428 U.S. 433, 446-47, *reh'g. denied*, 429 U.S. 874 (1976); *Garrett v. Lehman*, 751 F.2d 997 (9th Cir. 1985). These rulings have been applied to violations of Article 31. *Varn v. United States*, 13 Cl.Ct. 391 (1987); *Phillips v. Perry*, 883 F.Supp. 539 (W.D. Wash. 1995). The foregoing is reflected in the MILPERSMAN, which essentially states that any evidence is admissible at an ADB so long as it is relevant and competent.

r. DODDIR 1010.4 is implemented in the Naval service by Secretary of the Navy Instruction (SECNAVINST) 5300.28B of 11 July 1990, entitled "Military Alcohol and Drug Abuse Prevention and Control." Subparagraphs 5d and 5e of this directive state, in part, as follows:

> Military members who . . . are drug . . . dependent and require long-term rehabilitation, and those . . . drug abusers who are determined not to have exceptional potential for further useful, drug-free service shall be disciplined, as appropriate, and processed for separation . . .
>
> Military personnel who are alcohol and drug abusers but who are determined to have exceptional potential for future service and a high probability of successful treatment shall be disciplined, as appropriate, and provided counseling and/or treatment in order to rehabilitate and restore to full duty as many members as is feasible under enclosure (3).

Paragraph 1b of enclosure (3) to the directive states that "short term rehabilitation with a dedicated aftercare program for restoration and retention of the abuser evidencing potential for further useful drug-free service is also cost-effective and is a primary goal of the drug abuse control program." Paragraph 7b of enclosure (2) states that "drug abuse in the Navy by . . . senior petty officers . . . is inconsistent with their exemplary roles as leaders and voids their potential for further service. They will be disciplined as appropriate and processed for separation."

s. At the time of Petitioner's discharge, the MILPERSMAN stated that an individual "must be mandatorily processed for separation by reason of misconduct due to drug abuse based by one

or more military offenses . . . for . . . the illegal or wrongful use of controlled substances." This policy is known as "Zero Tolerance." However, applicable sections of the MILPERSMAN also state that the ADB is part of the administrative separation process, and an ADB may find that an individual committed misconduct due to drug abuse, but recommend retention in the Navy. Such a recommendation may be approved or disapproved by the discharge authority.

t. Federal court cases have held that it was improper to discharge a servicemember by reason of drug abuse without first affording him the opportunity for rehabilitation in accordance with DODDIR 1010.4. *Poole v. Rourke*, 779 F.Supp. 1546, 1565-68 (E.D. Ca. 1991); *Radillo v. Orr*, No. S-84-1003 EJG (E.D. Ca. 1984). In one case involving a second class petty officer, the court overturned a decision of the Board and concluded that the Navy's Zero Tolerance policy violated the provisions of DODDIR 1010.4. *Rogers v. Dalton*, No. C-94-3388 EFL (N.D. Ca. 1995).

u. Subsequently, the *Rogers* case was reconsidered by the Board, and the applicant's contention pertaining to the provisions of DODDIR 1010.4 was again rejected. The Board concluded that the ADB in that case could properly have concluded that the applicant could not be rehabilitated for the purpose of retention, in part because he used drugs while in a position of leadership after being repeatedly counseled that such use would not be tolerated. However, relief was granted on other grounds. Petitioner's counsel cites another case decided by the Board after *Rogers* in which the applicant, a junior enlisted servicemember, contended that his discharge was improper because of DODDIR 1010.4, and the Board upgraded his discharge. Relief was granted in that case because the applicant's ADB was advised that the individual's potential for rehabilitation could not be considered.

v. 10 U.S.C. 6330 states that an individual may only be transferred to the Fleet Reserve after 20 years of active military service. However, section 4403(b)(2) of Public Law 102-484, as amended, provides the Secretary of the Navy with Temporary Early Retirement Authority (TERA), through Fiscal Year 1999, to so transfer servicemembers with more than 15 years of active service.

MAJORITY CONCLUSION:

Upon review and consideration of all the evidence of record, the majority, consisting of Messrs. Brezna and Tew, concludes that Petitioner's request warrants favorable action. In this regard, the majority concludes that Petitioner's discharge was both unjust and erroneous.

The majority first points out that the only evidence of drug abuse in this case was gathered while Petitioner was undergoing inpatient treatment for a severe alcohol problem. During this

period, he disclosed his extensive history of drug abuse to a professional staff member at the treatment facility and to another patient. The majority believes that to use such admissions against Petitioner for any purpose is blatantly unfair and defeats the entire purpose of rehabilitation. Along these lines, the majority notes that alcohol and drug abuse are often intertwined, and that successful treatment of one cannot be accomplished without treating the other. It seems to the majority that in order for an individual to be rehabilitated from any form of addiction, he must "bare his soul" and confess the nature and extent of all addictions and substance abuse problems. This is exactly what Petitioner did. Even the CO of the TPU, who believed that Petitioner should be discharged, characterized Petitioner's revelation as "courageous and necessary for the purpose of achieving full recovery from substance abuse."

The majority is aware of the policy that an individual who seeks rehabilitation and treatment for a drug problem is not immune from separation. The majority also notes that the provisions of Article 31(b) are not applicable to a medical treatment situation such as the one at issue since Petitioner was not suspected of drug abuse when he made his inculpatory statements. Further, even if it could be said that a violation of Article 31 occurred, the statements would be admissible at an ADB. However, the majority believes it is unfair, though not legally improper, to use such statements against an individual without some sort of warning to the effect that any admission of illegal activity may be used in an administrative separation proceeding. Even with such a warning, however, the majority feels that there will be fewer instances of meaningful rehabilitation since individuals will be hesitant to make the sort of full disclosure necessary for such assistance.

The majority also concludes that Petitioner's discharge violated the provisions of DODDIR 1010.4 since he obviously was a suitable candidate for rehabilitation and retention in the Navy. Until 1992, Petitioner had a fine record and after a brief period of substandard performance, he returned to his earlier level of achievement. Clearly, he had overcome his deficiencies, and was permitted to reenlist only a few months before disclosing his drug abuse.

Turning to Petitioner's drug use, the majority concedes that he blatantly disregarded Navy policy by using a wide variety of drugs frequently and for a long time during his period of naval service. The majority wants to make it clear that it does not condone his use of drugs. However, Petitioner states that he stopped using drugs more than a year before he disclosed such use, and there is nothing in the record that contradicts this assertion. In fact, Petitioner's version is at least partially corroborated by the evaluation of the case manager, which stated that there had been "no indication of (drug) use within the past year."

The majority believes that given Petitioner's overall record and his successful efforts to stop using drugs on his own, he fell within the mandate of DODDIR 1010.4 to "rehabilitate the maximum feasible number" of drug abusers for retention. Along these lines, the majority finds that the directive was changed to eliminate this requirement after Petitioner's ADB but before ASN (M&RA) directed discharge. However, the majority believes that since the unchanged directive was in effect when discharge action was initiated and the ADB made its recommendation, this version was controlling. Further, the regulation does not say that senior enlisted servicemembers may not benefit from its provisions. The majority is also aware of the provisions of SECNAVINST 5300.28, but believes those provisions are irrelevant because they refer to the requirement that drug abusers be "processed for separation." Petitioner was so processed and the ADB, after considering the provisions of DODDIR 1010.4, recommended retention, a permissible outcome of separation processing.

In short, the majority believes the ADB was correct when it recommended retention, and ASN (M&RA) was wrong to disapprove that recommendation and direct Petitioner's discharge. Accordingly, the majority concludes that Petitioner's request to convert his discharge to a retirement under TERA should be granted.

In view of the foregoing, the majority finds the existence of an injustice warranting the following corrective action.

MAJORITY RECOMMENDATION:

a. That Petitioner's naval record be corrected to show that he was not discharged on 27 March 1996 but was transferred to the Fleet Reserve under TERA on that date. This corrective action should include removal of all documentation pertaining to the administrative separation action and issuance of a new Certificate of Release or Discharge from Active Duty (DD Form 214)

b. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.

c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made part of Petitioner's naval record.

MINORITY CONCLUSION:

Mr. Pfeiffer disagrees with the majority and concludes that Petitioner's request does not warrant favorable action.

The minority member is personally aware that the alcohol rehabilitation process is a difficult one that requires the individual to confront a variety of demons. However, the fact remains that the consumption of alcohol is legal but usage of non-prescription drugs is not. Given the fact that servicemembers are frequently briefed on the Navy's Zero Tolerance policy, the minority believes that Petitioner knew that his admissions concerning drug abuse would not be privileged in the same way as statements pertaining to his abuse of alcohol. This is especially true concerning his statements to the other patient, some of which apparently took place outside of any formal classroom or rehabilitation meeting. Accordingly, the minority does not believe any warning comparable to Article 31(b) is necessary or appropriate.

The minority would also point out that if Petitioner had decided he needed help for his drug problem, independent of the alcohol rehabilitation program, and sought such assistance from a Navy counselor, he would still have been subject to discharge under the policy set forth in OPNAVINST 5350.4B. This directive encourages such disclosures by stating that they may not be used to support disciplinary action or an adverse discharge. The minority member believes this strikes an appropriate balance between encouraging drug abusers to seek help, and the requirement for a drug-free Navy.

The minority is aware of Petitioner's overall excellent record and his apparently successful efforts to halt his use of drugs. It is clear to the minority that the ADB considered these factors in light of DODDIR 1010.4 in arriving at its recommendation for Petitioner's retention in the Navy. However, the provisions of the directive that called for rehabilitation and retention of drug abusers were deleted as of 18 January 1996. Accordingly, the minority does not believe that ASN (M&RA) was bound by them when he elected to disapprove the ADB's recommendation for retention.

The minority believes that given the change to DODDIR 1010.4, at the time of Petitioner's discharge, SECNAVINST 5300.28B provided the highest level of regulatory guidance on the rehabilitation and retention of drug abusers in the naval service. Along these lines, the minority notes that the latter directive only requires that certain individuals be processed for separation, and does not appear to preclude the retention of any servicemember at the conclusion of such processing. However, the minority believes the directive can be read as a general policy statement concerning the cases in which retention is appropriate, and those in which it is not. In this regard, paragraph 5d of the regulation states that retention is not appropriate for those individuals who are drug dependent, and does not distinguish between a dependency in remission and one which is not. Further, enclosure (2) of the directive states that senior petty officers are not appropriate candidates for retention. Since Petitioner

was a chief petty officer who had been diagnosed as drug dependent, his retention would not have been consistent with the dictates of SECNAVINST 5300.28B. Accordingly, the minority member concludes that ASN (M&RA) acted properly in directing Petitioner's discharge, notwithstanding the contrary recommendation of the ADB.

Even if the unchanged version of DODDIR 1010.4 could be viewed as carrying over until Petitioner's case was finalized, the minority does not believe those provisions mandated Petitioner's retention. DODDIR 1010.4 called for rehabilitation of "the maximum feasible number" of drug abusers. Discharge was authorized for those abusers "who could not or would not" be rehabilitated. The minority member believes it is important to keep in mind that the mandate for rehabilitation in the directive means rehabilitation for the purpose of retention. The minority member does not believe that it is feasible to rehabilitate and retain an individual such as Petitioner, who used drugs while in a position of leadership as a chief petty officer. It is a fundamental tenet of leadership that someone in such a position must set a good example for subordinates, and such an individual is rightly held to a higher standard of conduct. Petitioner also suffered from a serious alcohol problem and was diagnosed with a personality disorder. Based on the foregoing, ASN (M&RA) could reasonably have concluded that it was not feasible to rehabilitate Petitioner for the purpose of retention in the Navy.

In view of the foregoing, the minority finds no injustice warranting corrective action.

MINORITY RECOMMENDATION:

That Petitioner's request be denied.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

ALAN E. GOLDSMITH
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.

W. DEAN PFEIFFER

OCT 29 1999

**MAJORITY REPORT:**
**Reviewed and approved:**

OCT 29

Carolyn H. Bedraft
Assistant Secretary of the Navy
(Manpower & Reserve Affairs)

**~~MINORITY REPORT:~~**
**Reviewed and approved:**